ORIGINAL

DOCKET FILE COPY ORIGINAL

RECEIVED
MAR 27 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Public Interest Obligations	)	MM Docket No. 99-360
of TV Broadcast Licensees	)	

COMMENTS OF BELO

Michael J. McCarthy
Executive Vice President
BELO
Communications Center
400 South Record Street
Dallas, Texas 75202

Richard E. Wiley
James R. Bayes
Marjorie J. Dickman
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

March 27, 2000

No. of Copies rec'd 0+4
List A B C D E

TABLE OF CONTENTS

PAGE

I. INTRODUCTION/OVERVIEW 1

II. BELO 3

III. THERE IS NO NEED FOR FURTHER BURDENSOME REGULATION OF TELEVISION PROGRAM CONTENT—BROADCASTERS PROVIDE AN AMPLE SUPPLY OF PUBLIC INTEREST PROGRAMMING AND WILL HAVE A COMPELLING INCENTIVE TO CONTINUE TO DO SO IN THE DIGITAL AGE 4

A. Television Stations Already Are Subject to Numerous and Substantial Public Interest Obligations, Which Suffice to Ensure the Continuing Availability of Ample Public Interest Programming in the Digital Age 4

B. Television Broadcast Licensees Have Long Been Champions of Public Interest Programming 6

1. Television stations excel at providing a very substantial quantity of top quality news, information, and other non-entertainment programming 6

2. A significant and increasing number of stations voluntarily provide free airtime to federal candidates 9

C. Intense and Ever-Increasing Competition Provides More Than Sufficient Incentive for Broadcasters to Continue to Offer High Quality, Original, Locally-Oriented Public Interest Programming 12

D. Historically, the Government Has Recognized That Broadcasters Are Entitled to a Substantial Degree of First Amendment Protection 13

E. Scarcity Is No Longer a Viable Rationale for Imposing Increased Public Interest Obligations on Broadcasters 15

IV. THE DIGITAL SPECTRUM "GIVE-AWAY" IS A MYTH—AND THUS FAILS TO PROVIDE A LEGITIMATE RATIONALE FOR BURDENING TELEVISION BROADCASTERS WITH ADDITIONAL PUBLIC INTEREST OBLIGATIONS 18

A. Broadcasters Are Being Loaned Second Channels During the Digital Transition for the Benefit of the Public 18

B. During the "Loan" Period, Broadcasters Must Invest Billions for Transition to DTV—Without Any Guarantee of Recovering These Costs 19

V. RESPONSE TO SPECIFIC NOI "AREAS OF INQUIRY": BROADCASTERS CAN BEST SERVE THE PUBLIC INTEREST BY CONTINUING TO RESPECT THEIR PUBLIC INTEREST RESPONSIBILITIES AND SUPPORTING VOLUNTARY INDUSTRY INITIATIVES 22

A. Challenges Unique to the Digital Era: It Is Imprudent to Contemplate the Imposition of Additional Public Interest Obligations on Television Broadcasters at This Early Stage in the Digital Era 23

B. Responding to the Community 26

1. Broadcasters should be encouraged to disseminate more broadly information on their efforts to identify and address local concerns in their public interest programming 26

2. Broadcasters should be encouraged to use digital technology to transmit improved disaster warnings 28

3. The imposition of a set of mandatory minimum public interest obligations is unnecessary and would be counterproductive 29

C. Enhancing Access to the Media 30

1. Broadcasters should be encouraged, on a voluntary basis, to explore ways to provide greater access to the media to persons with disabilities 31

2. Broadcasters should be encouraged to consider voluntary industry initiatives to increase opportunities for participation in the media by minorities, women, and small businesses 32

D. Enhancing Political Discourse: Broadcasters Should Be Encouraged to Consider, on a Voluntary Basis, a Broad Range of Programming and Other Options to Elevate Political Discourse 33

E. Proposal for Expanded Educational Programming in the Digital Age 34

VI. CONCLUSION 37

SUMMARY

Belo respectfully submits that it would be counterproductive for the Commission to impose additional public interest obligations on television broadcast licensees in the digital era. There simply is no legitimate need for additional regulation of television program content. Television broadcasters already are subject to a series of public interest obligations that are more than sufficient to ensure the availability of ample public interest programming.

More importantly, broadcasters have a long-standing tradition of voluntarily providing the public with a substantial amount of public interest programming. Indeed, a study recently undertaken by Belo testifies to the substantial amounts of non-entertainment programming that broadcasters in a broad range of markets already provide. For example, in six of the television markets in which Belo currently owns stations, the major network affiliates currently dedicate at least one-third of their total programming hours to non-entertainment broadcasts.

Likewise, a significant and increasing number of stations provide free airtime to political candidates on a voluntary basis. Since 1996, Belo stations have aired an hour-long program offering qualified federal and state candidates free time on local Belo and PBS stations. In addition to its commitment to continue and expand this series, Belo recently has launched an initiative to expand its coverage of the 2000 national and local elections. Thus, Belo, like many other broadcasters, already is committed to the important goal of informing the electorate about their candidates.

Because today's media marketplace offers consumers a virtually limitless range of programming options, broadcasters will have every incentive to continue providing a substantial amount of public interest programming in the future. In such an intensely competitive environment, broadcasters need to focus on their greatest strength -- locally-oriented public

interest programming. Thus, as broadcasters move into the digital age, they can be expected only to step up their already extensive efforts to serve the news and public affairs programming needs of their audiences. Moreover, in this abundant multichannel environment, the Commission's traditional rationale for subjecting the broadcast industry to content-based regulation—the so-called "scarcity rationale"—is obsolete and constitutionally suspect.

Thus, there is no practical need for increased levels of content regulation, and the transition to digital television does not provide a rationale for imposing such regulatory burdens. In this regard, it should be recognized that the digital spectrum "giveaway" is no more than a myth. In fact, second channels are merely being loaned to broadcasters as a necessary component of the successful roll-out of digital television. Moreover, there are immense financial burdens associated with transitioning to digital services. Indeed, the total cost for DTV conversions is now estimated to be $17 billion. While digital conversion is necessary for broadcasters to remain competitive in the evolving multichannel marketplace, there is no definitive guarantee that the necessary expenditures will be offset by any corresponding increase in revenues.

For these reasons, Belo believes that broadcasters can best serve the public interest during and after the digital conversion period by continuing their long tradition of providing public service programming and by supporting voluntary industry initiatives— rather than by adhering to government-dictated programming obligations. Thus, Belo submits that regardless of whether broadcasters opt to multicast, to provide HDTV, or to multiplex DTV programming and other services, at this early stage in the digital era, the FCC should refrain from imposing any fees on broadcasters and from extracting specific public interest obligations.

Rather, because it is impossible to predict the future of digital services, broadcasters should be given the flexibility to experiment with varied approaches to the provision of digital television services. This approach will better enable the industry to realize the full potential of this promising technology. Additional regulatory requirements, with their inevitable side-effects of rigidity and standardization, likely would have the opposite effect—that of stifling experimentation and slowing the expansion of digital technology.

In addition, Belo believes that broadcasters should be encouraged to increase their initiatives to inform viewers of their efforts to address local concerns. Likewise, although broadcasters currently are very committed to keeping viewers informed about disaster-related events, Belo agrees with the Advisory Committee recommendation that broadcasters should work with emergency communications specialists and equipment manufacturers to determine the most effective way to use digital technology to relay disaster warning information. Belo submits, however, that broadcasters can and should be encouraged to increase such efforts without the imposition of specific, burdensome regulations.

The Company also vigorously opposes the imposition of mandatory minimum public interest obligations. The public would be much better served by continued voluntary adherence to long-standing industry principles and practices with respect to the provision of public-interest programming. In Belo's opinion, most broadcasters would willingly agree to abide by such generally accepted public interest principles, including the provision of programming responsive to the needs and interests of children and coverage of debates and other candidate forums. In the end, the "court of public opinion," rather than a governmental body, will prove to be the best judge of such industry standards.

Belo offers a similar response to the FCC's inquiry regarding the use of digital technology to provide greater media access to persons with disabilities: the Company endorses the Advisory Committee recommendation that broadcasters should be encouraged to explore ways to offer enhanced access, including expanded closed captioning, video description, and data streaming. In addition, Belo shares the general commitment of broadcasters to diversity and equal employment opportunities and endorses voluntary industry initiatives to increase opportunities for and participation by minorities, women, and small businesses in the nation's television broadcasting system.

With respect to the Commission's specific proposals to enhance the broadcast of political discourse, Belo believes that voluntary industry initiatives will be the best vehicle to strengthen broadcasters' commitment to free airtime for candidates as well as the overall quality of political presentations. Finally, Belo strongly supports the proposal to allow a second broadcast channel to be retained by the noncommercial stations in each market in order to air additional educational, instructional, and public interest programming.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Public Interest Obligations of TV Broadcast Licensees	)	MM Docket No. 99-360

COMMENTS OF BELO

I. INTRODUCTION/OVERVIEW

Belo hereby submits its comments in response to the Notice of Inquiry ("NOI") released by the Commission on December 20, 1999 in the above-captioned proceeding to solicit comments concerning the public interest obligations of television broadcast licensees in the digital era.[1] The NOI was released, in part, in response to the report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters ("Advisory Committee") and to a petition for rulemaking or notice of inquiry filed by People for Better TV.[2] Notably, the

---

[1] See Public Interest Obligations of TV Broadcast Licensees, Notice of Inquiry, MM Docket No. 99-360, FCC 99-390 (rel. Dec. 20, 1999) ("NOI").

[2] The Advisory Committee met during 1997 and 1998 to discuss the public interest obligations of digital television broadcasters. The Advisory Committee was comprised of 22 individuals chosen by President Clinton, including broadcasters, producers, academics, computer industry representatives, public interest advocates, and advertisers.

On December 18, 1998, the Advisory Committee submitted a report to Vice President Gore, which contains ten recommendations regarding public interest obligations of television broadcasters. See Advisory Committee Report on the Public Interest Obligations of Digital Television Broadcasters, Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters at 43-67 (1998)

(Continued...)

Commission chose to release a notice of inquiry in this proceeding, thereby initiating a public debate on the topic—as opposed to a notice of proposed rulemaking, which would have proposed specific rules.[3] The NOI requests information in four general areas: (i) challenges unique to the digital era; (ii) responding to the community; (iii) enhancing access to the media; and (iv) enhancing political discourse.[4]

(...Continued)
("Advisory Committee Report"). The Advisory Committee, however, did not reach a consensus on many of these recommendations—as indicated by the Advisory Committee members' eleven Separate Statements included at the end of the Report. Robert W. Decherd, Belo's Chairman of the Board/President/Chief Operating Officer, served on the Advisory Committee and submitted a Separate Statement (jointly with Harold C. Crump, Vice President, Hubbard Broadcasting, Inc., and William F. Duhamel, Ph.D., President, Duhamel Broadcasting Enterprises).

On June 3, 1999, People for Better TV ("PBTV"), filed a petition for rulemaking and a petition for notice of inquiry to determine the public interest obligations of digital television broadcasters. See People for Better TV, Petition for Rulemaking and Petition for Notice of Inquiry (filed June 3, 1999). PBTV subsequently submitted a letter to Chairman Kennard reiterating its request. See Letter from People for Better TV to William E. Kennard, Chairman, FCC, Nov. 16, 1999.

On October 20, 1999, the Vice President submitted a letter to FCC Chairman William Kennard asking that the Commission address certain of the Advisory Committee's recommendations. Specifically, the Vice President asked the FCC to address the Advisory Committee's recommendations concerning political discourse, disaster warnings, disability access to digital programming, and diversity. See Letter from Vice President Al Gore to William E. Kennard, Chairman, FCC, Oct. 20, 1999, at 2-3 ("Vice President's Letter"). The NOI was issued two months later and focuses primarily on the four areas identified in the Vice President's letter.

[3] See NOI at ¶ 5 (citing Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service, MM Docket No. 87-268, Fifth Report and Order, 12 FCC Rcd 12809, 12830 (1997) ("Fifth Report and Order") ("The Commission . . . [chose] to issue a 'Notice [of Inquiry] to collect and consider all views on this subject. . . .'"); id. at ¶ 8 (emphasis added) ("[The FCC] believe[s] that it is an appropriate time to create a forum for public debate.").

[4] See id. at ¶¶ 5-6.

For the reasons set forth below, Belo urges the FCC to proceed cautiously during the transition to DTV. The agency should resist calls to expand the public interest obligations of television broadcast licensees simply because they will be utilizing a new technology to provide broadcast service to the public.[5] The Company respectfully submits that there is no identifiable need for further burdensome regulation of television program content, and that any heightened content-oriented public interest obligations would be constitutionally suspect. Indeed, history demonstrates that television broadcast stations have provided outstanding public interest programming and a high level of service to their local communities for decades, with minimal governmental intervention. With the ever-increasing competition in the information marketplace, stations have even more incentive to provide such programming and locally-oriented service in the digital era. Further, the imposition of additional public interest obligations may very well stifle experimentation and slow the transition to digital service—a devastating result for the Commission, the television broadcast industry, and, most importantly, the public.

II. BELO

Belo is the oldest continuously operating business institution in Texas. Beginning in 1842 as The Daily News, originally a one-page newspaper published in Galveston, the Company has grown to become one of the nation's leading media companies, with a diversified group of television broadcasting, newspaper publishing, cable news, and electronic media assets. Belo entered the television business in 1950, when it acquired WFAA-TV in Dallas-Fort Worth,

[5] See Fifth Report and Order at 12830.

Texas. Currently, Belo owns eighteen full-service television broadcast stations and manages two additional stations under local marketing agreements, reaching 14% of U.S. television households. In addition to its flagship publication, The Dallas Morning News, and the associated Arlington Daily News, the Company currently publishes six other daily newspapers. Belo, directly or through joint ventures, also operates five local or regional cable news channels and operates an interactive business called Belo Interactive.

III. THERE IS NO NEED FOR FURTHER BURDENSOME REGULATION OF TELEVISION PROGRAM CONTENT—BROADCASTERS PROVIDE AN AMPLE SUPPLY OF PUBLIC INTEREST PROGRAMMING AND WILL HAVE A COMPELLING INCENTIVE TO CONTINUE TO DO SO IN THE DIGITAL AGE

A. Television Stations Already Are Subject to Numerous and Substantial Public Interest Obligations, Which Suffice to Ensure the Continuing Availability of Ample Public Interest Programming in the Digital Age

Belo believes that existing regulations are more than sufficient to ensure that television station licensees comply with their public interest programming obligations in the digital age. Among other public interest programming requirements, television stations already are required to offer programming responsive to community needs, as well as comply with complex political broadcasting rules, strict regulations regarding children's television programming, closed captioning rules (and, if pending FCC proposals are adopted, video description requirements), and a number of other restrictions on television programming content. As part of their community responsive programming requirement, for example, television stations must keep quarterly community responsive programming reports in their public inspection files[6] and certify compliance with this requirement in their license renewal applications.

The Commission also enforces a myriad of complex political broadcasting rules with which television stations must comply. Stations are required to permit federal candidates "reasonable access" to purchase commercial time,[7] sell time to political candidates at the "lowest unit charge" for comparable time,[8] and afford candidates "equal opportunities" to respond when opposing candidates "use" a broadcaster's station.[9]

Moreover, since January 1997, the government has closely regulated television programming for children by requiring television stations to air at least three hours of "core" educational and informational television programming per week for children sixteen and younger.[10] In addition, the FCC rigorously enforces commercial time limits on programs for children twelve and younger.[11]

Furthermore, television stations must adhere to sponsorship identification[12] and closed captioning rules,[13] and may soon be required to comply with video description rules as well.

---

[6] 47 C.F.R. § 73.3526(e)(11)(i).

[7] 47 C.F.R. § 73.1944.

[8] 47 C.F.R. § 73.1942(a)(1).

[9] 47 C.F.R. § 73.1941(a)-(b).

[10] 47 C.F.R. § 73.671.

[11] 47 C.F.R. § 73.670.

[12] 47 C.F.R. § 73.1212.

[13] 47 C.F.R. § 79.1.

Under the closed captioning rules—which were phased in beginning on January 1, 1998—broadcasters must caption 95% of all "new" non-exempt programming, and caption 75% of "pre-rule" programming, by 2008.[14] Moreover, if a recently released FCC proposal is adopted, television stations will be subject to video description rules in the near future. The proposal, which was released late last year in a notice of proposed rulemaking, suggests that—no later than eighteen months after the effective date of the Commission's video description rules—broadcasters affiliated with the ABC, CBS, Fox, and NBC networks in Nielsen's top 25 Designated Market Areas and larger multichannel video programming distributors would be required to provide at least 50 hours per calendar quarter of described prime time and/or children's programming.[15]

B. Television Broadcast Licensees Have Long Been Champions of Public Interest Programming

1. Television stations excel at providing a very substantial quantity of top quality news, information, and other non-entertainment programming

Local broadcasters have a long tradition of providing quality public interest programming for their viewers on a voluntary basis, with minimal government intervention. Indeed, in the NOI, the Commission acknowledges that "many broadcasters have served the public interest in numerous ways over the years" and that "many television broadcasters have demonstrated a

---

[14] Id.

[15] See Implementation of Video Description of Video Programming, Notice of Proposed Rulemaking, MM Docket No. 99-339, FCC 99-353, at ¶ 20 (rel. Nov. 18, 1999).

strong record of community service."[16] Thus, in most television markets, three, four or more network-affiliated stations—as well as other independent competitors—already provide extensive non-entertainment programming to meet the needs of local viewers. This rich diversity of program offerings is the result of market forces, not government regulation.

Indeed, a programming study recently undertaken by Belo demonstrates that representative television broadcasters in a wide range of markets currently provide very substantial amounts of non-entertainment programming—i.e., newscasts, news/information programs, public affairs shows, instructional programs, children's/educational programming, and religious programs—on a voluntary basis.[17] The study, which sought to analyze the quantity of non-entertainment programming across a variety of market sizes, reviewed six markets in which Belo owns television broadcast stations (ranging from the 7th - to the 125th-ranked markets).[18] In

---

[16] NOI at ¶¶ 8, 21.

[17] Non-Entertainment Programming Study (Belo) 2000 ("Non-Entertainment Programming Study") (copy attached as Appendix A).

Similarly, a survey of NAB members, covering the time period August 1, 1996 to July 31, 1997, reported that television broadcast stations aired an average of 137 Public Service Announcements ("PSAs") per week; the average station provided $968,865 worth of time for PSAs per year; the Big Four television networks aired 41 PSAs per week for a contribution of $324.4 million per year, while television broadcast stations collectively contributed $707.3 million per year; and the average television broadcast station raised $867,300 per year. See Broadcasters Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service (NAB) Apr. 1998 (summary of results available at <http://www.benton.org/Policy/TV/meeting5.html>) ("NAB Report"). Moreover, 66% aided disaster victims; 81% consulted with local community leaders in choosing issues and causes for public service offerings; and 52% of their PSAs were produced locally or dealt with local issues. Id.

[18] The study analyzed the Dallas-Fort Worth, Houston, Seattle-Tacoma, Phoenix, Hampton-Norfolk, and Boise markets. These markets are ranked 7th, 11th, 12th, 17th, 40th, and 125th, respectively. Television and Cable Factbook, A-1 - A-3 (1999).

the aggregate, the major network affiliates in those markets dedicated approximately one-third or more of their total broadcast hours to non-entertainment programming.[19] These findings disprove the suggestion of some advocates of increased regulation that only a few "good" broadcasters in the largest markets excel at serving their local communities.[20]

Belo's programming study also revealed that four of the six Belo stations surveyed broadcast 72 or more hours per week of non-entertainment programming, while all six of the stations broadcast over 60 hours per week of non-entertainment programming.[21] With respect to newscasts alone, three of the stations studied air approximately 45 hours per week, while the remaining three stations air 32 or more hours per week.[22]

Many individual Belo stations broadcast even more non-entertainment programming. For example, in Belo's largest market, its flagship television broadcast station, WFAA-TV (ABC), Dallas-Fort Worth, airs over 82 hours of non-entertainment programming per week.[23] Because of

---

[19] Non-Entertainment Programming Study. In all six markets, the major network affiliates jointly air over 215 hours of non-entertainment programming per week. Id. Moreover, the network affiliates in the Dallas-Fort Worth and Phoenix markets provide 275 or more hours of non-entertainment programming. Id. Thus, these stations alone contribute a very substantial amount of high quality and diverse programming to the information "mix" in their respective markets.

[20] Moreover, a nearly identical study commissioned by Belo in 1998 revealed that in fourteen of the markets in which Belo owned stations at the time, the network affiliates jointly aired over 200 hours of non-entertainment programming per week—or at least 30% of their total broadcast hours. Non-Entertainment Programming Study (A.H. Belo Corporation) 1998. Thus, local broadcasters clearly have made an enduring commitment to airing a substantial amount of informational programming.

[21] Non-Entertainment Programming Study 2000.

[22] Id.

[23] Id.

Belo's commitment to news and informational programming, WFAA-TV has become an established leader among broadcasters in the Dallas-Fort Worth market.

Similarly, KTVB(TV) (NBC), Boise—one of Belo's small market stations—WVEC-TV (ABC), Hampton-Norfolk, and KING-TV (NBC), Seattle-Tacoma, air, on average, 79, 75, and 73 hours of non-entertainment programming per week, respectively.[24] In addition, KTVB(TV) and KHOU-TV (CBS), Houston, each currently air, on average, almost 45 hours of local and national newscasts per week.[25] Furthermore, KING-TV, KTVB(TV), KTVK(TV) (IND), Phoenix, and WVEC-TV each air, on average, 20 hours or more of news/information programs per week.[26] The records of these representative stations demonstrate that television broadcasters nationwide, whether in large or small markets, provide a very substantial amount of high quality news, information, and other non-entertainment programming and, thus, unquestionably are serving the interests of their communities of license.

2. A significant and increasing number of stations voluntarily provide free airtime to federal candidates

In 1996, Belo—in conjunction with local PBS affiliates—voluntarily initiated an hour-long program called "It's Your Time," which offered certain federal and state candidates five minutes of free airtime on local Belo and PBS stations.[27] The series, which is aired without commercial interruption, features the views of candidates for the U.S. Senate, the U.S. House of

---

[24] Non-Entertainment Programming Study.

[25] Id.

[26] Id.

[27] Belo also offers the hour-long program as a public service to local cable operators and radio
(Continued...)

Representatives, and State Governor in each area served by a Belo station. For the 1997-1998 election cycle, Belo revamped "It's Your Time" to include separate one-minute candidate statements in addition to the longer statements which are incorporated into an hour-long program aired by the Belo and PBS affiliates in each market. 135 candidates availed themselves of the opportunity to participate, providing over twelve hours of additional information on these political races. The Company also is offering "It's Your Time" in connection with the 1999-2000 election cycle and is committed to continuing and expanding the series.

In addition, Belo has launched an initiative to expand its coverage of the 2000 national and local elections. Under this new program, each Belo television station will broadcast three stories per week focusing on candidates or election issues during its evening newscasts. The stories will start airing sometime between 30 and 45 days before an election and, when possible, will include "ad watches" (analyses of political advertisements) or "issue checks" (coverage of a particular candidate's position on an issue). When feasible, stations also will provide live coverage of general election presidential debates. These efforts will be further enhanced by Belo's web sites. Select sites will provide space for candidate issue statements and responses to pertinent questions; some sites will host "e-town meetings," allowing voters to express opinions and gather information on local issues. The web sites also will provide voter registration information as well as links to other voting-related sites.

Many other broadcasters voluntarily provide similarly innovative programs designed to inform the public, including extensive coverage of state, county, and local elections in special

---

(...Continued)
stations.

programming and in news and public affairs programs.[28] For example, a survey of NAB members revealed that, during the 1996 election campaign period, half of the television stations surveyed offered to sponsor and air debates and forums; 20% aired a debate or forum sponsored by an outside group; 44% aired a local public affairs program dealing with the elections; 63% ran special segments profiling candidates and/or their positions on issues; 91% ran PSAs urging people to vote; and 75% ran combination on- and off-air public service campaigns.[29]

Even more broadcasters have committed to providing free airtime and informational political programming in connection with the 2000 election cycle. For example, Hearst-Argyle Television, Inc. recently launched "Commitment 2000," an initiative aimed at providing more comprehensive news coverage of national, state, and local election campaigns.[30] The effort includes a promise by all Hearst-Argyle television stations to air debates, candidate forums, and town hall meetings; to add "Commitment 2000" web pages to their web sites; to develop relevant stories focusing on relevant issues during the 30-day periods leading up to primary and general elections; and to broadcast "ad watch" segments and voter registration PSAs.[31] Similarly, the E.W. Scripps Company has announced "Democracy 2000," a public discourse initiative that will make free airtime available to select political candidates.[32] Each of the company's nine network-

---

[28] "[B]roadcasters have devoted many hours of program time to political coverage." NOI at ¶ 35.

[29] NAB Report.

[30] Hearst-Argyle Launches Commitment 2000, A Group-Wide Effort to Strengthen Political News Coverage, Hearst-Argyle Television, Press Release, Jan. 5, 2000.

[31] Id.

[32] Scripps Making Free Airtime Available to Candidates, The E.W. Scripps Company, Press Release, Jan. 13, 2000.

affiliated stations will provide five minutes of free time to candidates nightly during the 30 days preceding this year's general elections. The stations also will provide free time as needed during the 30 day periods leading up to primary elections and will feature election-related content on their web sites.[33]

These public interest initiatives—none of which is required under existing political broadcasting laws—reflect broadcasters' long-standing commitment to service their audiences. Thus, they can be expected to continue to thrive in the digital age, even in the absence of government regulation.[34]

C. Intense and Ever-Increasing Competition Provides More Than Sufficient Incentive for Broadcasters to Continue to Offer High Quality, Original, Locally-Oriented Public Interest Programming

The information revolution has led to an explosion in information outlets.[35] Today, television broadcasters face intense competition from a dazzling array of information providers, including cable television, DBS, wireless cable, the Internet, videocassette sales and rentals, radio, newspapers, magazines, and direct mail. As a result, viewers have a broader choice of outlets for news, information, and entertainment than ever before.

---

[33] Id.

[34] In this regard, Belo believes it is noteworthy that campaign finance reform legislation died in 1999 in both the House and the Senate, and that the provision of free airtime was not a component of any of the proposals.

[35] See Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Report and Order, MM Docket Nos. 91-221, 87-8, FCC 99-209, at ¶ 1 (rel. Aug. 6, 1999) (The FCC, in relaxing its local ownership rules governing television broadcast stations, stated that "[t]he new rules . . . reflect a recognition of the growth in the number and variety of media outlets in local markets. . . ."); see also id. at ¶ 7 ("[T]here has been an increase in the number and types of media outlets available to local communities.").

In this multi-outlet information marketplace, localism is the unique characteristic that distinguishes television broadcasters from their competitors. The most important aspect of localism is providing programming responsive to community needs and interests. Thus, to compete and thrive in the ever-changing information marketplace, broadcasters must focus on their principal strength—the fact that they provide locally-oriented television and public interest services.

The incentive to provide such high-quality local news and public affairs programming will only increase in the digital era, as many stations develop suitable programming for additional multiplexed channels and compete for viewers in a converging video marketplace. Thus, the expansion of channel capacity in the digital age can be expected to lead to the introduction of entirely new programming services that are specifically devoted to recognized public interest needs such as news, public affairs, political discourse, and the educational needs of children.

Accordingly, the intense and ever-increasing competition in the information marketplace —the deeply-rooted marketplace incentive—will continue to ensure an ample supply of news, information, and other non-entertainment programming to serve the needs and interests of local television viewers. Moreover, there is no evidence to suggest that the imposition of additional regulatory burdens will have any appreciable impact on television stations' present incentives to address viewers' news and information needs.

D. Historically, the Government Has Recognized That Broadcasters Are Entitled to a Substantial Degree of First Amendment Protection

While the perceived "scarcity" of available channels has, at least in past judicial decisions, served to justify a greater degree of regulation than would be permissible in dealing with the print media, it has nevertheless been recognized that broadcasters are entitled to a substantial degree of First Amendment protection. Accordingly, even prior to the emergence of the modern multichannel television marketplace, government oversight in this area reflected considerable sensitivity to First Amendment values.

As the U.S. Supreme Court stated long ago, the Communications Act of 1934 recognized "that the field of broadcasting is one of free competition."[36] The court went on to explain that: "Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."[37] Under this regime, Congress intended to "preserve values of private journalism" and to rely primarily on competition, rather than government regulation, as the preferred vehicle for promoting the "public interest" in broadcasting.[38] Although Congress found that dangers to the public interest could arise from either "private or official censorship," it concluded that "Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the most to be avoided."[39]

Thus, while the FCC has asserted a limited role in enacting some content-related regulations, it has generally restricted itself to the adoption of generalized public interest guidelines and has relied largely on private journalism and private editorial decision-making for

---

[36] FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 474 (1940).

[37] Id.

[38] Columbia Broadcasting Systems v. FCC, 412 U.S. 94, 109 (1973).

[39] Id. at 105.

the specific amplification of these policies. In so doing, the agency typically accords broad deference to the reasonable good-faith programming decisions of individual broadcasters. Moreover, to a very substantial degree, the FCC has placed reliance on the voluntary commitment to community service that has long been a tradition within the broadcast industry—as well as on marketplace incentives that reward those stations that most effectively respond to the needs and interests of their viewers in the provision of local public interest programming.

E. Scarcity Is No Longer a Viable Rationale for Imposing Increased Public Interest Obligations on Broadcasters

Traditionally, the constitutional validity of government oversight of the broadcast industry has been premised largely on the inaccurate notion that there continues to be a "problem" of scarcity in the number of available broadcasting outlets. In recent years, however, the scarcity rationale has been expressly repudiated by the Commission itself, strongly questioned by Congress and the courts, and criticized by distinguished scholars.

Indeed, the FCC determined more than a decade ago that the dramatic growth in the number of available broadcasting outlets had rendered the scarcity doctrine obsolete.[40]

[40] Syracuse Peace Council v. Television Station WTVH, 2 FCC Rcd 5043, 5052-53 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989); see also id. ("[T]he [scarcity] rationale . . . is no longer sustainable in the vastly transformed, diverse market that exists today."). Indeed, as FCC Commissioner Michael K. Powell has stated more recently, "[A]s we undertake this inquiry we have a solemn obligation to evaluate honestly the extent to which scarcity can still justify greater intrusion on broadcasters' First Amendment rights. It is ironic . . . that as we enter the digital age of abundance and tout its myriad of opportunities for more information through more outlets, we simultaneously propose greater public interest obligations that infringe upon speech, justified on the crumbling foundation of scarcity." NOI (Concurring Statement of Commissioner Michael K. Powell at 1); see also Michael K. Powell, Commissioner, FCC, Remarks before The Media Institute (Apr. 22, 1998) ("1998 Powell Remarks") ("TV stations now have the potential to produce at least four times the number of channels of programming . . . and compression technology promises to expand this even further."); 1998 Biennial Regulatory Review—Review

(Continued...)

Specifically, the Commission stated, "[T]he scarcity rationale developed in the Red Lion decision and successive cases . . . is no longer sustainable in the vastly transformed, diverse [communications] market that exists today."[41] Moreover, in reviewing the FCC's action, the Court concluded that "the [Commission] . . . found that the 'scarcity rationale,' which has historically justified content regulation of broadcasting, is no longer valid."[42]

Congress similarly has expressed doubts as to the viability of the scarcity rationale. The Telecommunications Act of 1996 (the "1996 Act") was undeniably viewed by Congress as a mechanism through which to signal its view that the broadcast industry has been transformed since the Red Lion era. In enacting the 1996 Act, for example, the House Commerce Committee observed that, in light of vast changes in the mass media marketplace, "the scarcity rationale for government regulation no longer applies."[43]

Furthermore, "[f]or years, scholars have argued that the scarcity of the broadcast spectrum is [not] an accurate technological description of the spectrum."[44] Rather, the dynamic

---

(...Continued)
of the Commission's Broadcast Ownership Rules, Notice of Inquiry, 13 FCC Rcd 11276 (1998) (Separate Statement of Commissioner Harold W. Furchtgott-Roth, at 3) (citing 1985 Fairness Report, 102 FCC 2d 142 (1985) and Syracuse Peace Council) ("One of the most fundamental ways in which the broadcast landscape may have changed is that . . . there are significantly more outlets for communications than there once were.").

[41] Syracuse Peace Council v. Television Station WTVH, 2 FCC Rcd at 5053; see also 1998 Powell Remarks ("[T]oday's communications environment . . . makes the reasoning of Red Lion seem almost quaint.").

[42] Meredith Corp. v. F.C.C., 809 F.2d 863, 867 (D.C. Cir. 1987) (internal citations omitted).

[43] Communications Act of 1995, H.R. Rep. No. 104-204, 104th Cong. 1st Sess. at 54 (July 24, 1995).

[44] Action for Children's Television v. F.C.C., 58 F.3d 654, 675 (D.C. Cir. 1995), cert. denied 516
(Continued...)

supply of usable spectrum depends on the state of communications technology and the system adopted by the federal government for licensing the use of that spectrum. At any point in time, there could be less "scarcity" if television receivers were produced with more demanding specifications, or if transmissions were packed more densely into a given bandwidth or transmitted at a higher frequency. Clearly, "all resources are scarce in the sense that people often would like to use more than exists."[45]

In any event, whatever one may think in an ultimate sense about the continuing validity of the scarcity doctrine, it is indisputable that the "problem" of limited channel capacity is much diminished today.[46] Moreover, it is certain that this alleged problem will continue to decline

---

(...Continued)
U.S. 1043 (1996) (Edwards, C.J., dissenting). See, e.g., Glen O. Robinson, The Electronic First Amendment: An Essay for the New Age, Duke L.J. at 5 (Spring 1998) ("By the 1980s . . . the emergence of a broadband media . . . was supplanting traditional, single-channel broadcasting and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the use of a scarce . . . radio spectrum, it no longer did."); Mark D. Director and Michael Botein, Consolidation, Coordination, Competition, and Coherence: In Search of a Forward Looking Communications Policy, 47 Fed. Comm. L.J. 229, 233-34 (1994) ("The courts' historical approach to creating rigid distinctions among the media—e.g., 'scarcity' in broadcasting—is obsolete."); William T. Mayton, The Illegitimacy of the Public Interest Standard at the FCC, 38 Emory L.J. 715, 718 (Summer 1989) ("[T]he predicate for . . . a presumed natural scarcity, if it ever existed at all, certainly no longer exists."); Laurence H. Winer, The Signal Cable Sends—Part I: Why Can't Cable be More Like Broadcasting?, 46 Md. L. Rev. 212, 238-39, 254-56 (Winter 1987)("[T]he concept of a unique, physical limitation on the availability of broadcast frequencies is questionable . . . from a technological point of view there is no inherent shortage of spectrum capacity—nor was there any fifty years ago . . . [F]rom its inception, the scarcity rationale for regulation of broadcasting was flawed on factual, legal, and policy grounds as well as in its application. . . . [S]carcity is a thing of the past.").

[45] Action for Children's Television v. F.C.C., 58 F.3d at 675 (Edwards, C.J., dissenting); see also Telecommunications Research & Action Ctr. v. F.C.C., 801 F.2d 501, 508 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987).

[46] See Action for Children's Television v. F.C.C., 58 F.3d at 675 (Edwards, C.J., dissenting) ("spectrum-based communications media now have an abundance of alternatives").

further in the digital age—as additional multiplexed channels are added to the already substantial complement of over-the-air broadcast television outlets. Accordingly, it is paradoxical (to say the least) that some would now use this digital transition as an occasion for an unprecedented expansion in the levels of government content-based regulations.[47]

IV. THE DIGITAL SPECTRUM "GIVE-AWAY" IS A MYTH—AND THUS FAILS TO PROVIDE A LEGITIMATE RATIONALE FOR BURDENING TELEVISION BROADCASTERS WITH ADDITIONAL PUBLIC INTEREST OBLIGATIONS

A. Broadcasters Are Being Loaned Second Channels During the Digital Transition for the Benefit of the Public

As the NOI states, "in implementing [the statutory framework for the transition to DTV],[48] the Commission required that broadcasters air 'free digital video programming service . . . during the same time period that their analog channel is broadcasting.'"[49] The allocation of

---

[47] Some proponents of expanded content regulation claim to find support in views attributed to James Madison. See, e.g., Advisory Committee Report at 20-21. However, "Madison believed that individuals possess[] a property right in their ideas and opinions." John O. McGinnis, Property-Based Vision of the First Amendment, 63 U. Chi. L. Rev. 49, 56 (1996). Madison "also understood that the ability to transmit information . . . need[s] special protection from government interference . . . [and that] . . . the function of the First Amendment is to prohibit regulation of [this] important property right" when it is threatened by government action. Id. at 56-57 (emphasis added).

Further, the U.S. Supreme Court decision, Arkansas Educational Television Commission v. Forbes, 523 U.S. 666 (1998), effectively lays to rest the notion that the public forum doctrine can be used to justify heightened regulation of broadcasters. See id. at 683 (holding that a candidate debate on a state-owned public television station was a nonpublic forum rendering the broadcaster's decision to exclude a candidate a reasonable, viewpoint-neutral exercise of journalistic discretion).

[48] 47 U.S.C. § 336.

[49] See NOI at ¶ 11 (quoting Fifth Report and Order , 12 FCC Rcd at 12820).